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No. 906

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IN THE

Supreme Court of the United States

October Term, 1959

CHARLES L. ENGELSHER, M. D., as Director, Owner and Licensee of a private proprietary hospital known as "PARKCHESTER GENERAL HOSPITAL,"

Petitioner

-AGAINST-

MORRIS A. JACOBS, M. D., as Commissioner of Hospitals of the City of New York and as Chairman of the Board of Hospitals of the City of New York,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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MORRIS A. JACOBS, M. D., as Commissioner of Hospitals of the City of New York and as Chairman of the Board of Hospitals of the City of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Supreme Court of the United States:

Charles L. Engelsher, the Petitioner herein, prays that a writ of certiorari issue to review the Final Order of the Court of Appeals of the State of New York entered on the 13th day of March, 1959.

Opinion Below

The opinion of the Court of Appeals of the State of New York is reported in 5 N. Y. 2d 370. A copy of this opinion is hereto annexed and marked Exhibit "A" hereof.

Jurisdiction

The Final order of affirmance of the Court of Appeals of the State of New York which is sought to be reviewed herein, was made and entered on the 13th day of March, 1959.

No motion for an order requesting a rehearing was made to the Court of Appeals of the State of New York nor was any application made for an order extending the time within which to petition for a writ of certiorari.

The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C. and Sections 2101 (c) and 2104, on the ground that review by the Supreme Court by writ of certiorari is sought of an order of affirmance on appeal by the Court of Appeals of the State of New York. Certiorari is sought on the grounds, that the Court of Appeals of the State of New York has rendered a decision of an important federal question of substance not heretofore determined by this Court, and/or has decided it in a way probably not in accord with the applicable decisions of this Court.

Questions Presented for Review

1. Whether or not Section 56, Subd. 4(b) of the Hospital Code and Regulations promulgated by the New York City Board of Hospitals, effective as of October 1, 1956, which among other things requires the enlargement of the floor area required to be occupied by each bed in other than single rooms in private proprietary hospitals built and in operation prior to October 1, 1956, as compared with previous requirements established by the Regulations governing the maintainance of such hospitals and in effect for 25 years prior to October 1, 1956, and which in effect compels petitioner to remove 30 beds from his

hospital constructed in accordance with the requirements of the Regulations in effect prior to October 1, 1956, deprives petitioner of his property without due process of law in violation of his constitutional rights under the Fourteenth Amendment:

2. Whether or not the aforementioned Section 56, Subd. 4(b) of the Hospital Code and Regulations which applies solely to private proprietary hospitals catering to only 20% of the paying patients in the City of New York hospital field and does not apply to voluntary or city hospitals in the City of New York, which cater to 80% of such paying patients, is unreasonably discriminatory against private proprietary hospitals and thus denies petitioner, who is the owner and operator of a private proprietary hospital, equal protection of the law guaranteed to him under the Fourteenth Amendment of the Federal Constitution:

3. Whether or not the aforementioned Section 56, Subd. 4(b) of the Hospital Code and Regulations is an ex post *facto* law, in that it denies to petitioner who is the owner of a private proprietary hospital constructed in accordance with the previous requirements of the Regulations governing the maintainance of private proprietary hospitals, his right to property and to follow his vocation in violation of Section 10 of Article 1 of the Federal Constitution.

Provisions of the Constitution of the United States in Point

"AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. • • • ,,

"ARTICLE I—THE CONGRESS

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. • • • ,,

STATUTORY PROVISIONS IN POINT

Applicable Provisions of the New York City Charter

"§583. Powers and duties of commissioner.—The commissioner shall have all the powers and duties of the department except those vested by law in the board of hospitals. (As added by L.L. 1950, No. 98, July 27. Former §583 renumbered to be §583-a.)

"§583-a. Jurisdiction of department.—a. The department shall:

1. Maintain and operate all hospitals, sanatoria, alms houses or other institutions of the city for the care of sick, injured, aged or infirm persons, except as otherwise provided by law, and shall have

charge and control of the ambulance service provided by the city, and, except as otherwise provided by law, over any psychopathic service for the examination, observation and treatment of persons and over any other service maintained by the city for the care of sick, injured, aged or infirm persons as may be assigned to the department or the commissioner by law.

2. Visit, inspect and license in the discretion of the commissioner all private proprietary hospitals, sanatoria, nursing homes, convalescent homes, homes for the aged or for chronic patients, or other private proprietary institutions wherein human beings are nursing care and or custodial supervision, unless such institutions are incorporated by special act of the legislature or are under the state department of social welfare or are duly licensed under the provisions of the mental hygiene law or of section four hundred eighty-two of the penal law. A license issued under this subdivision shall expire one year from the date of the issuance thereof, unless, in the discretion of the issuance thereof, unless, in the discretion of the commissioner, it shall be sooner revoked, and may be renewed. The board of hospitals, notwithstanding any other provision of law, is hereby authorized to promulgate and include in the hospital code necessary rules and regulations to carry out the purposes of this subdivision to protect the public health and welfare, which shall, before the same become effective, be filed with the city clerk and published in The City Record for three days and shall thereafter have the force and effect of law. The establishment and or maintenance of any such institution without a license therefor as in this subdivision provided

shall be a misdemeanor punishable by a fine not to excess five hundred dollars or by imprisonment for a period not exceeding one year, or by both. (as amended and renumbered by L.L. 1950, No. 98, July 27—formerly §583.) • • •

"§583-d. Hospital Code.—a. The board of hospitals is hereby authorized and empowered to promulgate a hospital code and from time to time to add to and to alter, amend or repeal any part of such code. Such hospital code shall consist of such rules and regulations, not inconsistent with the constitution or the laws of this state or with this charter, as may be necessary to carry out the powers and duties vested by law in the department of hospitals and the board of hospitals. • • • "

The Regulations Involved

For the convenience of the Court, the pertinent rules, both the old as well as the new, dealing with bed capacity required in private proprietary hospitals, are quoted herewith:

1) Old Rules Provided By The Regulations Governing The Establishment And Maintenance Of Private Proprietary Hospitals, Promulgated By The Department Of Hospitals, And In Effect For Approximately 25 Years And Until October 1, 1956:

As to bed capacity:

Article II of Regulations:

"The application shall indicate the number of patient beds that will be placed on each floor and the total bed capacity of the hospital. Should the hospital desire to increase the bed capacity it will be necessary to apply for an amended permit."

Article V (f)

"(f) Rooms and Wards: All rooms to be occupied by patients shall open directly to the external air, with suitable windows for light and ventilation. All beds used for patients shall be at least three feet apart where arranged in series and at least two feet from lateral adjoining walls."

. . . . . .

2) New Rules Provided By The New Hospital Code (Article III) Promulgated By The Board Of Hospitals For The Establishment And Maintenance Of Private Proprietary Hospitals And In Effect Since October 1, 1956:

As to bed capacity:

Section 56(4):

"Floor Space and Physical Facilities.

(a) The floor area of each single private room in hospitals which have never been licensed prior to October 1, 1956, shall be at least one hundred (100) square feet. Each single room in institutions which have been licensed prior to October 1, 1956, shall have a floor area of at least seventy (70) square feet.

(b) Each bed in other than single private rooms shall have a floor area of at least seventy (70) square feet and shall be separated from any other bed by at least three (3) feet and from lateral adjoining walls by at least two (2) feet.

(c) In rooms housing more than one (1) patient, equipment shall be provided which shall permit privacy to each patient when indicated."

. . . . . .

Manner in Which Federal Questions Sought to Be Reviewed Were First Raised

The federal questions now sought to be reviewed were first raised in the Court of first instance in the pleadings, to with the petition herein in paragraphs designated "55" and "59" therein wherein petitioner alleged.

> "55. That the discriminatory provisions of the new Hospital Code and Regulations, as well as the due process clauses of the State and Federal Constitutions, particularly as affecting private proprietary hospitals, including the Parkchester General Hospital, which were constructed and had their bed capacity, per room built in accordance with lawful authorization, require a review and annulment of the respondent's determination" (113, 114).*
>
> "59. That petitioner verily believes, and was so informed by counsel, that the determination made by the respondent is arbitrary, capricious, unreasonable and contrary to the law and is in plain violation of petitioner's constitutional rights, both under the State as well as the Federal Constitution and is violative of the provisions of the New York City Charter" (118).

The Court of first instance, Special Term, Part 1 of the Supreme Court of the State of New York, by its order dated June 20, 1958 wherein petitioner's application was denied (16-20) in effect held Section 56, Subd. 4(b) of the Amended Hospital Code and Regulations to be constitutional.

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* Numerals in parentheses refer to folios of the printed record on appeal to the Court of Appeals of the State of New York unless otherwise designated.

The federal questions now sought to be reviewed were again raised in the intermediate Appellate Court, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, by petitioner's notice of appeal to said Court (13-15) which brought up for review the questions raised in the lower Court and in petitioner's brief on appeal to said intermediate Appellate Court which urged, among other things, the federal constitutional questions now sought to be reviewed.

The Appellate Division of the Supreme Court of the State of New York, First Judicial Department by its order of affirmance dated December 11, 1958 (610-615) in effect held Section 56, Subdivision 4 (b) of the Amended Hospital Code and Regulations to be constitutional.

The federal questions now sought to be reviewed were again raised in the court of last resort of the State of New York, the Court of Appeals of the State of New York, by petitioner's notice of appeal to said Court (598-609) which raised for review the specific constitutional questions.

By a divided opinion (See Exhibit A annexed hereto), the Court of Appeals of the State of New York by a divided Court found Section 56, Subdivision 4 (b) of the Amended Hospital Code and Regulations to be constitutional.

ARGUMENT RELIED ON FOR ALLOWANCE OF WRIT

A. The new Hospital Code is unreasonably discriminatory against private proprietary hospitals and thus denies petitioner who is the owner and operator of a private proprietary hospital, equal protection of the law and his right as a citizen to pursue a lawful trade or business, which rights are guaranteed petitioner under the Constitution of the United States.

It is not denied that the limitations as to bed capacity as provided by Article III, Section 56(4) *are limited to private proprietary hospitals*, which provide 20% of the hospital care for paying patients in the City of New York and *do not apply* to voluntary hospitals or City hospitals, maintained and operated by respondent, which provide the bulk or 80% of such care.

Petitioner contends that his constitutional rights guaranteed by the Fourteenth Amendment of the Constitution of the United States are being violated in that the Hospital Code, is applicable *only* to owners and or operators of private proprietary hospitals catering to a small percentage (20%) of the hospital needs of the paying patients in the City of New York, while the operators of voluntary and City hospitals catering to 80% of such needs are not so affected, that it abridges the privileges of petitioner and denies him equal protection of the law.

The leading case on the subject, which in our opinion fully supports the petitioner's contention, is that of *The New York Sanitary Utilization Co.* v. *The Department of Public Health of New York*, 32 Misc. 577; aff'd 61 App. Div. 106, decided by the Supreme Court, New York Special Term, October 1900. While the case is an old one, it has been steadfastly adhered to and cited with approval repeatedly, as it represents sound law which applies

equally today as it did 58 years ago. The statute there attacked was Chapter 663 of the Laws of 1900, which was an act to amend Section 1212, Chapter 378 of the Laws of 1897, known as the Greater New York Charter. The amended act contained the following provision:

> "It shall not be lawful for any person or persons incorporated or unincorporated or any corporation or corporations, to carry on, establish, prosecute or continue, within the borough of Brooklyn, the occupation or trade or business of rendering or treating with steam or boiling garbage, swill or offal."

Plaintiff attacked the statute on several grounds, one of them being that it deprived it, as well as all other persons in the Borough of Brooklyn, of the right and privilege secured to *all* citizens of this State to pursue a lawful trade and business.

The Court in sustaining that ground, said *inter alia* at page 581:

> "The statute in question, while prohibiting the carrying on, or the continuance of such trade or business in the borough of Brooklyn, impliedly permits it to be carried on in any of the other boroughs of Greater New York.
>
> Under these circumstances the statute is obnoxious to the criticism that it is arbitrary, unreasonable, and was not an act in the interest of the public generally; that is to say, the public of Greater New York."

How pertinent is the reasoning of the Court in the above case to the underlying principle in the instant proceeding? Here we have regulations requiring enlarged

floor areas per bed, none of which were required in Regulations in effect prior to October 1, 1956, and these regulations apply *only* to a small segment of the hospital field, while the bulk of the hospital field in the City of New York catering to 80% of the needs of New York City, insofar as paying hospital patients are concerned, is not burdened by such requirements. *It is therefore not an act in the interest of the public generally.*

Nor can the respondent claim that these regulations are justified under the doctrine of police powers. Again we are confronted with the fact that this so-called "police power" is being exercised in the case of a small segment of the hospital care field.

Police power exercised by a sovereignty has been defined in the case of *People ex rel. Wineburgh Advertising Co. v. Murphy*, 129 App. Div. 260, aff'd 195 N. Y. 126 (at pages 262-3), where the Court stated:

> "There are certain general and well-settled rules, however, which, if observed, will greatly aid in determining whether or not the police power of the State has been exceeded in any particular case. '*The power must be exercised subject to the provisions of both the Federal and State Constitutions, and the laws passed in the exercise of such power must tend, in a degree that is perceptible and clear, toward the preservation of the public safety, or the lives, health and morals of our inhabitants, or the welfare of the community.* But the Legislature cannot arbitrarily infringe upon the liberty or property rights of any person living under the Constitution, nor prevent him from adopting and following any lawful profession, trade or industrial pursuit, not injurious to the community, that he may see fit; nor prevent him from making contracts with reference

thereto. To justify the State in interposing its authority in behalf of the public, it must appear that the (interests) *of the public generally, as distinguished from those of a particular class*, require such interference and that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The Legislative determination as to what is a proper exercise of the police power is subject to the supervision of the court, and in determining the validity of an act it is its duty to consider not only what has been done under the law in a particular instance, but what may be done under and by virtue of its authority.' (Fisher Co. v. Koods, 187 N. Y. 90). This epitome of the rules surrounding and limiting the exercise of the police power finds support in a great number of cases in the courts of this and other States and of the United States. As we took occasion to say in City of New York v. Wineburgh Advertising Co. (122 App. Div. 748): 'To justify an act or ordinance which in any degree interferes with the liberty of the individual, or with the full enjoyment by him of his property, it must appear by reasonable intendment that it is calculated, intended, convenient and appropriate to conserve the public health, welfare, comfort or morals, and while it lies primarily within the discretion of the enacting body to determine what laws are appropriate and proper for that purpose, *yet the duty remains in the courts, when called upon, to scrutinize the measures sought to be enforced to see whether they really fall within*

the limitations of the police power. (Matter of Jacobs, 98 N. Y. 98.)'" (Emphasis supplied.)

See also:

Health Department v. *Rector*, 145 N. Y. 32.

In effect the "police power" as may be claimed here is merely a sham or smoke screen in an attempt to justify a patently unconstitutional municipal regulation. The Courts will look around the title to see in fact what the purpose and result of the regulation are.

The above reasoning and conclusions support the contention of the appellant that the Hospital Code and Regulations, by its limited application to private proprietary hospitals violates appellant's rights under the Fourteenth Amendment of the Constitution of the United States in that it abridges his privileges and denies him equal protion of the law.

B. The new Hospital Code deprives petitioner of his property without due process of law in violation of his rights guaranteed under the Constitution of the United States.

The uncontradicted facts in this proceeding as alleged in the petition are; that petitioner until January 3, 1957, and for 16 years prior thereto, operated the said hospital lawfully; that the Regulations in effect until October 1, 1956, did not require a floor area of 70 square feet for one bed; that the bed capacity allowed to petitioner in accordance with the licenses previously issued to him, the last one in effect until January 3, 1957, was 130 beds; that he is now required to reduce that capacity to 100 beds; that because of his failure to comply, he is directed to discontinue the operation of the said hospital, which represents an investment of upwards of $1,500,000.00;

and that he faces a criminal charge of operating the hospital without a license because of his failure to comply with the provisions of the Code and the directive to discontinue the operation of the said hospital. (Sec. 66 of Hospital Code and Sec. 583-e of New York City Charter.)

Petitioner contends that his constitutional rights guaranteed to him by the Fourteenth Amendment of the Constitution of the United States are violated in that he is threatened with the loss of his liberty and property without due process of law.

Again we respectfully refer this Court to the leading case of *N. Y. S. U. Co.* v. *Department of Public Health*, 32 Misc. 577, 583; aff'd 61 App. Div. 106, cited in Point I of this brief. There the Court said *inter alia* on pages 582, 583:

> "Second. Said statute also violates some of the above-mentioned constitutional provisions, because it deprives the plaintiff of its property without due process of law. * * *"
>
> "As above stated, the act in question requires the immediate discontinuance of said trade or business; and it contains no provision whatever for compensation to the plaintiff for the destruction of its plant, or for depriving it of the right to earn the compensation secured to it by said contract, for the performance thereof. *Moreover, it is well settled that an act of the Legislature is not due process of law.* It, therefore, follows that the objection that the act deprives the plaintiff of its property 'without due process of law' is well taken." (Emphasis supplied.)

See also *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, where the Court of Appeals, at page 231, said:

"• • • *The legislative power of the State is, however, not plenary, but is limited by the Constitution of the United States and by the Constitution of the State. It may not take private property without compensation even for a public purpose and to advance the general welfare.* (Matter of Eaton v. Sweeney, 257 N. Y. 176.) 'The protection of private property in the fifth amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the fourteenth amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the constitution of the United States.' (Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 415.)

In the prevailing opinion in that case, Mr. Justice Holmes pointed out that 'the general rule at least is, *that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking*' (p. 415). Whether a regulation does go too far is 'a question of degree—and therefore cannot be disposed of by general propositions,' and here Mr. Justice Holmes gave warning that 'we are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change' • • •." (Emphasis supplied.)

Certainly in the instant proceeding, it is well demonstrated that the regulation, which compels petitioner to eliminate 30 beds from his hospital and thus reduce petitioner's ability to supply accommodations to 30 patients with the resultant loss of income to appellant of approximately 23% as heretofore allowed him by the Regulations in effect until October 1, 1956, and the further fact that voluntary and City hospitals are not similarly required to reduce their bed capacity, is in the language of the late Justice Holmes "a regulation which goes too far and it will be recognized as a taking."

It, therefore, follows, that the objection that the Hospital Code deprives the appellant of his property and threatens him with the loss of his liberty without due process of law, is well taken and the said Code, specifically the regulations thereof concerning bed capacity, should be nullified and declared unconstitutional by this Court.

C. Section 56, Subdivision 4(b) is repugnant to the Constitution of the United States as being an *ex post facto* law and a law impairing the obligation of a contract.

The uncontradicted facts as alleged in the petition, show that respondent contends that petitioner is bound by the provisions of the New York Hospital Code and must reduce the bed capacity of the hospital from 130 to 100 beds, notwithstanding the fact, that the structural layout of the rooms in the said hospital, constructed in line with plans submitted to the Department of Hospitals and previously approved by it and in line with annual licenses previously issued to appellant since 1940, the last of which expired on January 3, 1957, allowed appellant a bed capacity of 130 beds or approximately 23% more than is now permitted by the Hospital Code.

Respondent apparently realizes that the Board of Hospitals has no power to deprive persons owning and/or operating private proprietary hospitals of their property rights without due process of law. The Board in fact, distinguishes in the new Code between property rights of hospital owners licensed prior to October 1, 1956, who had their room-layouts constructed in accordance with previous lawful authorization (which allowed floor area per bed of less than required under the new Hospital Code) and those of owners of new hospitals to be opened and licensed since October 1, 1956, as evident by the following language in Section 56(4), Subdivision (a):

> "The floor area of each single private room in hospitals *which have never been licensed prior to October 1, 1956*, shall be at least one hundred (100) square feet. Each single room in institutions *which have been licensed prior to October 1, 1956*, shall have a floor area of at least seventy (70) square feet." (Emphasis supplied.)

For reasons however not explained, respondent failed to make this distinction in Subdivision (b) of the Section, which reads as follows:

> "(b) Each bed in other than single private rooms shall have a floor area of at least seventy (70) square feet and shall be separated from any other bed by at least three (3) feet and from lateral adjoining walls by at least two (2) feet."

In any event, there would be no logic to recognize the special situation of hospitals licensed prior to October 1, 1956, by allowing them a variance of 30 square feet per bed in single rooms, and disregard completely the same situation concerning floor area in rooms other than single, which if followed through, would have allowed appellant a floor area of 40 square feet per bed in such rooms.

It is quite apparent that for reasons best known to itself the Board of Hospitals chose to attempt to impose impossible conditions upon the owners of private proprietary hospitals with regards to beds in other than single private rooms (as provided in §56, Subd. b of the new Hospital Code). While the respondent in the present case and as he does in all cases attacking his rules and regulations is prone to confuse the issue with the claim of police power and protection of public health, there is no such justification of the regulations being attacked in this case, especially in view of the fact that the City's own hospitals are not encumbered by similar regulations. Certainly there should be no difference in the standard for protection of the public health as practiced in City hospitals and in other voluntary hospitals from the standard established for private proprietary hospitals. Certainly whether a hospital is operated for profit or not, the same standard for the protection of the public health should be imposed as to all equally.

It is to be noted that the Hospital Code in Section 41(4) thereof, provides that "*new institutions, under construction prior to October 1, 1956*, whose plans have been approved by the Department of Buildings and the Commissioner of Hospitals (the respondent herein), shall be subject only to those building requirements which are applicable to institutions *which were in existence and licensed prior to that date*". This very provision in the Hospital Code confirms petitioner's contention that the Hospital Code must protect petitioner's constitutional rights. Certainly if the property rights of *new institutions under construction prior to October 1, 1956* are protected by Section 41(4) of the Code, old institutions already built and in operation under licenses issued prior to October 1, 1956, are equally entitled to the protection of their licensees' property rights and should not be deprived of their properties without due process of law.

The determination of the respondent based upon Section 56(4)(b) of the New Hospital Code which ignores these rights and directs petitioner to close the hospital and thus jeopardize an investment of upwards of $1,500,000.00 and further threatens petitioner with the loss of his liberty, is contrary to law and is based on an attempt to enforce a regulation "not consistent with the Constitution and laws of this State". And it is also violative of Section 10 of Article 1 of the Constitution of the United States which forbids, among other things, the passage of *ex post facto* laws and laws impairing the obligation of a contract.

CONCLUSION

The petition for a writ of certiorari should be granted and this Court in the exercise of its powers should declare Section 56, Subdivision 4(b) of the Hospital Code of the City of New York, unconstitutional.

Respectfully submitted,

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EXHIBIT A

5 New York Reports, 2d Series (pp. 370-380)

In the Matter of Charles L. Engelsher, as Director, Owner and Licensee of Parkchester General Hospital, Appellant, against Morris A. Jacobs, as Commissioner of Hospitals of the City of New York and as Chairman of the Board of Hospitals of the City of New York, Respondent.

Argued January 7, 1959; decided March 13, 1959.

Hospitals—private proprietary hospital—regulation—Board of Hospitals of City of New York properly refused to issue petitioner license permitting operation of private proprietary hospital on ground that he had not complied with New York City Hospital Code effective October 1, 1956—new regulations, changing required minimum floor area per bed and providing for increase in nursing staff do not consttiute unreasonable discrimination and do not violate due process provisions of State and Federal Constitutions (U. S. Const., 14th Amdt.; N. Y. Const., art I, § 6)—hospital's compliance with superseded regulations does not prevent exercise of police power—minimum space requirements not unreasonable as matter of law.

1. The Board of Hospitals of the City of New York properly refused to issue petitioner a license permitting him to operate a private proprietary hospital on the ground that he had not complied with new regulations of the New York City Hospital Code, which became effective on October 1, 1956.

2. The regulations changed the required minimum floor area per bed and also required an increase in the nursing staff for such hospitals. These new regulations do not

constitute an unreasonable discrimination and do not violate the due process provisions of the State and Federal Constitutions (U. S. Cont., 14th Amdt.; N. Y. Const., art 1, § 6). The fact that the regulations do not apply equally to municipal hospitals and voluntary nonprofit hospitals is not an unreasonable discrimination. The Legislature itself has established private proprietary hospitals in New York City in a separate class and has subjected them to special rules and regulations by the Board of Hospitals. The other institutions come under the close scrutiny of either the city or the State. Private hospitals, without regulation, do not.

3. Under the regulations, all private proprietary hospitals are treated alike. Equal protection is accomplished when all of the same class are treated in a like manner.

4. Moreover, it is not shown whether there are any similar regulations in other statutes or rules applicable to city hospitals or voluntary hospitals.

5. The new hospital code, which reduces the bed capacity of the hospital, does not constitute an unlawful taking in violation of due process of law because the hospital had been conducted in compliance with the regulations in the superseded hospital code. Compliance with existing laws does not prevent the exercise of the police power.

6. The minimum space requirements are not unreasonable as a matter of law and the Board of Hospitals did not act in an arbitrary manner in refusing a license to petitioner under the regulations.

Matter of Engelsher v. *Jacobs*, 7 A. D. 2d 720, affirmed.

APPEAL, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the First

Judicial Department, entered December 11, 1958, which unanimously affirmed an order of the Supreme Court at Special Term (SAUL S. STREIT, J.), entered in Bronx County, denying an application by petitioner to review and annul a determination of respondent which (1) denied an application by petitioner for variances from the provisions of the Hospital Code of the City of New York, (2) denied an application by petitioner for the renewal of a license, and (3) directed petitioner to discontinue operation of the hospital.

Menahem Stim and *Allen S. Stim* for appellant. I. The new hospital code is unreasonably discriminatory against private proprietary hospitals and thus denies appellant, who is the owner and operator of a private proprietary hospital, equal protection of the law and his right as a citizen to pursue a lawful trade or business, which rights are guaranteed appellant under the Constitutions of the United States and of the State of New York. (*New York Sanitary Utilization Co.* v. *Department of Health*, 32 Misc. 577, 61 App. Div. 106; *People ex rel. Wineburg Adv. Co.* v. *Murphy*, 129 App. Div. 260, 195 N. Y. 126; *Health Dept.* v. *Rector, Church Wardens & Vestrymen of Trinity Church*, 145 N. Y. 32.) II. The new hospital code deprives appellant of his property without due process of law in violation of his rights guaranteed under the Constitutions of the United States and of the State of New York. (*New York Sanitary Utilization Co.* v. *Department of Health*, 32 Misc. 577, 61 App. Div. 106; *Arverne Bay Constr. Co.* v. *Thatcher*, 278 N. Y. 222.) III. Section 56 (subd. 4, par. b) is repugnant to the Constitutions of the United States and of the State of New York as being an *ex post facto* law and a law impairing the obligation of a contract.

Raymond Rubin for Association of Private Hospitals, Inc., *amicus curiae*, in support of appellant's position.

I. The only issue before this court is whether or not the new standards as to area and nursing requirements of the code reasonably relate to the protection of patients' health and safety when such requirements are limited only to private patients with a choice of selection of hospital accommodations and are not applicable to city and voluntary hospitals where no such choice exists. (*Matter of Spielvogel* v. *Ford*, 1 N. Y. 2d 558.) II. The hospital code and specifically sections 48 and 56 (subd. 4, par. b) thereof are inconsistent with the Constitution of the State of New York, the Fourteenth Amendment to the Federal Constitution, the laws of the State of New York, and section 538-d of the New York City Charter, and are, therefore, unconstitutional.

Charles H. Tenney, Corporation Counsel (*Alfred Weinstein, Seymour B. Quel* and *Joseph Entel* of counsel), for respondent. It cannot be said that, regarding the need for regulation in the interest of public health, no reasonable basis can be conceived for distinguishing between hospitals operated for profit and those not operated for profit. Nor can it be said that the restrictions involved are not reasonably related to the protection of public health. Nor does the code make arbitrary distinctions in regard to the subject matter governed by it. (*Matter of Spielvogel* v. *Ford*, 1 N. Y. 2d 558; *Meiselman* v. *Crown Heights Hosp.*, 285 N. Y. 389; *Matter of 436 West 34th St. Corp.* v. *McGoldrick*, 288 N. Y. 346; *People ex rel. Bryant* v. *Zimmerman*, 241 N. Y. 405; *Queenside Hills Realty Co.* v. *Wilson*, 294 N. Y. 917, 328 U. S. 80.)

Burke, J. This article 78 proceeding was instituted by petitioner to compel the Board of Hospitals of the City of New York to issue to him a license permitting him to operate a private proprietary hospital. The board had denied the application since petitioner had not complied with new regulations of the New York City Hospital Code,

which became effective on October 1, 1956. This code superseded prior regulations, and was promulgated pursuant to subdivision 2 of section 583-a of the New York City Charter. The code made some changes in the rules and regulations governing the maintenance and operation of private proprietary hospitals. These regulations required that, in other than private rooms, each bed must have a floor area of 70 square feet. Insofar as private rooms were concerned, those hospitals licensed before 1956 were to have this same minimum floor area; those first licensed after the effective date of the new regulations were required to provide 100 square feet of floor area. The regulations also required an increase in the nursing staff for such hospitals.

Special Term denied petitioner's application to review and annul the determination of the board. This order was unanimously affirmed by the Appellate Division.

Petitioner claims that insofar as the new regulations require a minimum floor area for each bed, and an increase in the professional nursing staff, they not only constitute unreasonable discrimination, but also violate the due process provisions of the State and Federal Constitutions. (U. S. Const., 14th Amdt.; N. Y. Const., art I, § 6.) In regards to the equal protection argument, it is urged that since these regulations do not equally apply to municipal hospitals and voluntary non-profit hospitals, as well as private proprietary hospitals, there is unreasonable discrimination.

The police power of the State is the least limitable of all the powers of government. (*Block* v. *Hirsh*, 256 U. S. 135, 155; *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 83.) "A legitimate public purpose may always be served without regard to the constitutional limitations of due process and equal protection". (*People* v. *Arlen Service Stations*,

284 N. Y. 340, 344; *People* v. *Perretta*, 253 N. Y. 305, 309; *People ex rel. Durham Realty Corp.* v. *La Fetra*, 230 N. Y. 429; *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63.)

It cannot be disputed that hospitals come directly within the ambit of the police power since they are institutions which directly deal with the health of the citzenry. Where the hospital has been instituted by some branch of the Government—bei t local or State—the hospital is already under the direct control of the Government. Such is the case, for example, with municipal hospitals in the City of New York. These hospitals are, under the New York City Charter, to be maintained and operated by the Department of Hospitals of that city (New York City Charter, § 583-a, subd. 1). Nonprofit voluntary institutions are not subject to the regulation of the Department of Hospitals (New York City Charter, § 583-a, subd. 2; see, e.g., Social Welfare Law, § 21; 1948 Atty. Gen. 247). It is only private proprietary hospitals which come within the licensing and regulatory power of the Department of Hospitals. The New York City Charter authorizes the Board of Hospitals to promulgate the necessary rules and regulations for private proprietary hospitals to promote the public health and welfare (New York City Charter, § 583-a, sub. 2). Thus, we can see that the Legislature itself, in respect to private proprietary hospitals in New York City, has established them in a separate class and has subjected them to special rules and regulations by the Board of Hospitals. It is easy to see why such a distinction was made. These other institutions come under the close scrutiny of either the city or the state; private hospitals, without regulation, do not (see *People ex rel. Wagner* v. *Hagan*, 52 App. Div. 387, 389).

Furthermore, while these regulations apply only in terms to private propriety hospitals, it is not shown and, indeed, the record is devoid of any evidence as to whether

there are any similar regulations in other statutes or rules applicable to city hospitals or voluntary hospitals.

Under the regulations in question, all private proprietary hospitals are treated alike. Equal protection is accomplished when all of the same class are treated in a like manner. (*Queenside Hills Co.* v. *Saxl*, *supra*.) That one class is treated differently than other classes can give rise to no complaint under the equal protection clause.

It is urged that the hospital in question was conducted in compliance with the regulations in the superseded hospital code, and the new hospital code which reduces the bed capacity of the hospital constitutes an unlawful taking, violating due process of law. The argument, in effect, is that petitioner has a "non-conforming use", which was exercised prior to the effective date of the new regulations, and, therefore, should be permitted to continue in effect as long as petitioner continues in business or chooses to operate under the former regulations. It is clearly settled that "In no case does the owner of property acquire immunity against the exercise of the police power because he constructed it in full compliance with existing laws". (*Queenside Hills Co.* v. *Saxl*, *supra*, p. 83; see, also, *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410; *Hutchinson* v. *Valdosta*, 227 U. S. 303.) If authority is needed for such a proposition in this State, *Health Dept.* v. *Rector, Church Wardens & Vestrymen of Trinity Church* (145 N. Y. 32, 43-44) will substantiate this position.

The only question then that we must consider in this case is the reasonableness of the regulations. There can be no doubt that they are calculated to promote the health and welfare of the public generally. *Health Dept.* v. *Rector, Church Wardens & Vestrymen of Trinity Church* (*supra*) suggests that the cost of expenditures incurred as a result of the legislation must be reasonable. Where

there are two or more beds in a room, the minimum space requirements can be readily met by the removal of one or more beds. Hence, the main loss here is the loss of future profit. We cannot say as a matter of law that the minimum space requirements are unreasonable as a matter of law, and hence it follows that the Board of Hospitals did not act in an arbitrary manner in refusing a license to petitioner under the regulations.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

VAN VOORHIS, J. (dissenting). The problems presented by this litigation have their origin in an amendment to the Hospital Code and Regulations promulgated by the New York City Board of Hospitals (§ 56, subd. 4), effective October 1, 1956, which enlarged the floor area required to be occupied by each bed in double rooms in a proprietary hospital, and added to the number of professional nurses required to be in attendance. Appellant claims to have complied with these nursing requirements, but objects to increasing the floor space to be occupied by each bed in other than single rooms from about 62.5 square feet, as formerly, to 70 square feet, as newly required. In adopting the new regulation, the Board of Hospitals took account of the fact that it would be difficult to reconstruct existing single rooms so as to enlarge the floor space, and therefore provided that each single room in institutions licensed before October 1, 1956 might continue to have a floor area of at least 70 square feet, whereas new hospitals, licensed after that date, would be required to have a minimum floor area of 100 square feet. When it came to other than single rooms, however, no corresponding dispensation was allowed in the case of existing structures. The new regulation directs that each bed in other than single private rooms shall have a floor area of at least

70 square feet. The problem introduced by this requirement is that there are numerous private rooms designed for two patients with a space area of 125 square feet. That allows 62.5 feet to each bed. Unless the hospital is rebuilt in these areas, the requirement that each bed shall occupy a space of at least 70 square feet would require removal of one of these beds, leaving an area of 125 square feet for the other bed. That would be much larger than any minimum requirement for existing or newly constructed single rooms. The consequence would be to reduce the authorized bed capacity of this hospital from 130 beds to 100 beds.

This hospital was constructed in 1929. It was bought by appellant in 1940, and has been operated by him since that date. Licenses for its operation have been issued annually by the city's Department of Hospitals. During the previous 25 years, no minimum floor area was prescribed for each bed, it being simply required that "All beds used for patients shall be at least three feet apart where arranged in series and at least two feet from lateral adjoining walls."

The petition to compel a renewal of appellant's hospital license has been denied on the ground that the new requirement of a minimum of 70 square feet to a bed has been validly imposed and has not been complied with. Appellant contends that this new regulation deprives him of his right to pursue a lawful trade or business in violation of the State and Federal Constitutions. The principal ground on which its validity is challenged is that the equal protection of the law is denied for the reason that this regulation applies exclusively to private proprietary hospitals which provide hospital care for but 20% of paying patients in New York City, as contrasted with 80% provided for paying patients by the voluntary or city hospitals which are not limited as to bed capacity. If 7.5

additional square feet are necessary for the proper care of patients in proprietary hospitals, so as to bring the bed area to 70 square feet, it is difficult to understand why the same considerations affecting public health should not also apply to the larger number of patients hospitalized in these other institutions, nor is there reason why they should not likewise be extended to the nonpaying patients in city and other hospitals. Although the reach of the police power is wide, it must be exercised evenly under the Federal and State Constitutions so as to bear upon all who are affected by it without discrimination (*New York Sanitary Utilization Co.* v. *Department of Health*, 32 Misc. 577, affd. 61 App. Div. 106). The police power must serve the interests of the public generally as distinguished from those of a particular class, must be related to the advancement of public health, safety or welfare and its exercise will be restrained where it has some other object although ostensibly directed to the furtherance of one of the above-mentioned purposes (*People ex rel. Wineburg Adv. Co.* v. *Murphy*, 129 App. Div. 260, affd. 195 N. Y. 126; *Health Dept.* v. *Rector, Church Wardens & Vestrymen of Trinity Church*, 145 N. Y. 32; *New York Sanitary Utilization Co.* v. *Department of Health*, *supra*).

Appellant asserts that private proprietary hospitals (the Association of Private Hospitals Inc., has filed as *amicus curiae* representing 37 member proprietary hospitals) are not regarded with favor by the City of New York and charges, in effect, that this and other harassments are designed to compel them eventually to cease operation. The city takes note of the unequal incidence of this regulation upon proprietary hospitals and attempts to meet the contentions by arguing that there is a basis for classification in that city hospitals and voluntary hospitals are not profit-making enterprises. The brief for the city states: "We argue that there is a rea-

sonable basis for distinguishing between profit-making enterprises such as petitioner's and those not operated for profit, on the ground that where the profit motive is involved there is a need for regulation to insure that the desire to increase income and cut expenses does not result in dangerous overcrowding and understaffing."

This argument is unusual and, in our view, unsound. Motive, we have been told in criminal cases, is not a basis for conviction, but is of evidentiary value in determining whether the accused has been guilty of the conduct which constitutes the crime (*People* v. *Seppi*, 221 N. Y. 62, 70; *People* v. *Giordano*, 213 N. Y. 575, 584). "Motive can never, of itself, prove guilt", as was said in *Giordano*, and, conversely, where the act has been committed that the law forbids, motive is unnecessary to be shown (*People* v. *Feigenbaum*, 148 N. Y. 636). According to the reasoning of respondent, if a voluntary or city hospital provides 62.5 square feet to a bed, that meets with approval for the reason that it is not operated for profit. A proprietary hospital which has done the same thing is condemned on the basis that it acted for gain and, therefore, from what is assumed to be a sordid motive. If a party is authorized or forbidden to do what he does, the reasons which prompted him are ordinarily unimportant. "The assignment of an improper motive or reason, for doing an act, which the municipality was authorized to perform could not make that act illegal." (*Chase-Hibbard Milling Co.* v. *City of Elmira*, 207 N. Y. 460, 467.)

If regulations like this are to be upheld or struck down according to the self-interest or degree of unselfishness of the actor, it would be necessary to consider the pecuniary interest of the doctors themselves in the voluntary or city hospitals, and to weigh the animating motives of the trustees or public officers who are responsible for their operation. The city hospitals and voluntary hospitals

are also under unremitting pressure to admit patients due to Blue Cross and Blue Shield Plans and other forms of hospital or medical insurance and due to the cost of building new hospitals. Lack of an adequate number of hospital beds and nursing attendants to fulfill the demand is well known. Hospitals everywhere are notoriously overcrowded. The point is not that reasonable regulations are unlawful to prevent overcrowding, but that institutions cannot be discriminated against on the theory that the same act is commendable if performed by one but reprehensible if done by another.

Neither is it an answer to the discriminatory operation of this regulation that the Board of Hospitals does not have jurisdiction over paying patients in voluntary hospitals. Section 583-b of the New York City Charter gives the Board of Hospitals jurisdiction over city hospitals as well as proprietary hospitals, and over voluntary hospitals to the extent that they care for the overflow from the city hospitals at city expense. The city hospitals not affected by these limitations have 19,899 beds according to the latest annual report of the Department of Hospitals (1957) against 4,548 beds for the proprietary hospitals. This is a sufficient indication of unlawful discrimination in this regulation, even if the voluntary hospitals were to be left out of account.

The regulation is sought to be justified as an exercise of the police power upon no ground except promotion of the public health. If the health of patients in proprietary hospitals is affected, then the health of patients in the other hospitals in the city must be neglected. They are subject to no such regulation. There is no rational basis for distinction on the ground of public health, which is the only ground on which the police power can be invoked in this case. The majority opinion states that there is no evidence that the voluntary and city hospitals are not subjected to similar restrictions regarding bed area. The

petition alleges that the other hospitals are free from these restrictions which are imposed on the proprietary hospitals alone. If the decision is to be based on lack of evidence of these facts which are alleged in the petition, then the petitioner-appellant should be allowed opportunity to prove them at a trial instead of being ordered summarily to discontinue the hospital.

Appellant is deprived of property—the right to follow his trade or profession—without due process of law as a result of this discriminatory, retroactive limitation on bed areas adopted without relation to the public health. This regulation distinguishes, as has been stated, between single rooms in hospitals licensed before and after October 1, 1956. It fails to distinguish between double rooms in hospitals licensed before and after that date. If it was proper, as it manifestly was, not to require the reconstruction of hospitals by enlarging the single rooms, the same principle could have been applied in case of the double rooms.

The order appealed from should not have directed appellant to discontinue operation of the hospital, which was equivalent to dismissal of the petition on the law. On the other hand, appellant is not entitled to an order in the nature of a peremptory mandamus compelling the issuance of the license if there are other violations on account of which the license renewal could have been refused. The answer of respondent also charges that this hospital is not staffed with registered nurses to the extent required by the regulations. These nursing regulations are not limited to proprietary hospitals, but call for compliance everywhere in the city with section 110 of the Sanitary Code which requires a registered professional nurse to be assigned to the labor and delivery rooms when a patient is in active labor and a registered professional nurse to be on duty in the nursery. Although appellant's

affidavit states that he has complied with the requirements of section 110 of the Sanitary Code and all of the other nursing obligations, the Commissioner of Hospitals has not confirmed this and his affidavit indicates deficiency in regard to these matters on prior inspection of the hospital. The Sanitary Code requirements are not discriminatory, inasmuch as they apply throughout the city. Appellant should have an opportunity to try before the Special Term the issue of whether the hospital does comply with the Sanitary Code as he avers that it now does.

The order appealed from should be modified by eliminating the direction to appellant to discontinue operation of Parkchester General Hospital and by remanding the matter to Special Term for a trial in the nature of an alternative mandamus, with costs to appellants to abide the event.

Chief Judge Conway and Judges Desmond, Dye and Fuld concur and Judge Burke; Judge Van Voorhis dissents in an opinion in which Judge Froessel concurs.

Order affirmed.

Office-Supreme Court, U.S.
FILED
MAY 23 1959
JAMES R. BROWNING, Clerk

(35817)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 906

CHARLES L. ENGELSHER, M.D., as Director, Owner and Licensee of a private proprietary hospital known as "PARKCHESTER GENERAL HOSPITAL."

Petitioner,

against

MORRIS A. JACOBS, M.D., as Commissioner of Hospitals of the City of New York and as Chairman of the Board of Hospitals of the City of New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

There were no opinions at the Special Term of the New York Supreme Court or in the Appellate Division thereof. The opinion of the New York Court of Appeals and the dissenting opinion therein are reported at 5 N Y 2d 370, 157 N.E.2d 626.

Jurisdiction

The order of the New York Court of Appeals was entered March 13, 1959. Jurisdiction is invoked under 28 U.S.C., Section 1257(3).

Questions Presented

1. Whether a requirement that there shall be available for each hospital bed a minimum area of 70 square feet, included in a comprehensive set of legislatively authorized regulations applicable to hospitals operated for profit but not applicable to non-profit institutions, because of its limited applicability deprives petitioner, a profit-making hospital operator, of the equal protection of the laws.

2. Whether the minimum area requirement, which will compel petitioner, as a condition of his continued operation, to reduce the number of beds in his hospital from 130 to 100 or to alter the size of existing rooms if the required reduction is to be minimized, the capacity of 130 beds having long been permitted under previously applicable regulations, deprives petitioner of his property without due process, where it does not appear that the requirement is not reasonably related to the protection of patients' health and safety.

Legislation and Regulations Involved

In addition to the "Statutory Provisions in Point" set forth at pp. 4-7 of the Petition, there may be noted the following provision of the Hospital Code of the City of New York:

> "§40. *Definitions.* When used in this code or in the regulations of the Board of Hospitals relating thereto unless otherwise expressly stated the following definitions shall apply:
>
> 1. 'Private proprietary hospital' 'proprietary hospital,' or 'hospital' shall be held to mean an institution operated for the purpose of providing therein for

profit, services, facilities and beds for two or more persons, not related to the licensee, who require diagnosis, treatment, or care for illness, injury, deformity, infirmity or pregnancy, where such persons are kept for twenty-four (24) or more consecutive hours."

Statement

Petitioner since 1940 has owned and operated a proprietary hospital (33-34). In 1956 the Hospital Code superseded regulations which had been theretofore applicable (61). It continued old requirements regarding separation of beds from each other and from walls, but it added the requirement that each bed should have a minimum available area of 70 square feet (62-65). Other requirements were also added (68-70).

Conditions in petitioner's hospital were such as to place it in violation of the new requirements (70-71), and he applied for variances thereof (73). They were largely denied, and petitioner was directed, because of his failure to comply with the Code, to discontinue operation of his hospital (292-294). A renewal of his license had been denied for failure of compliance (304-305, 403-404).

This proceeding was brought to annul the direction to discontinue, and to compel the grant of the variances and the issuance of a license (119-120). Thereafter petitioner abandoned his demand for variances and sought to compel his licensure on the ground that the regulations, for violations of which a license had been refused, were constitutionally invalid. In this Court he attacks only the area requirement as above described (Pet., pp. 2-3).

Respondent initially interposed a procedural objection (351), and also the objection that in no event was petitioner

entitled to a license since his operation violated a requirement of law the validity of which was not questioned (329, 429). These objections were later withdrawn in the New York courts.

Petitioner asserted that the new area requirement would compel the reduction of the number of beds in his hospital from 130 to 100. An unspecified portion of this reduction, it was alleged, would be necessitated by the fact that the rooms having an area of 125 square feet would be usable for only one bed (112-113). It does not appear how much of a reduction would be required if petitioner were to join the area of these rooms by combining them with each other or with other rooms. Petitioner asserted that the required reduction in the number of beds would cause him "substantial loss" (113). It was not asserted that compliance was incompatible with continued profitable operation of the hospital.

POINT I

There is no substantial question regarding equal protection of the law.

(a)

The classification which includes only hospitals operated for profit is not arbitrary. "Statutory discrimination between classes which are in fact different must be presumed to be relevant to a permissible legislative purpose, and will not be deemed to be a denial of equal protection if any set of facts could be conceived which would support it." *Asbury Hospital* v. *Cass County*, 326 U.S. 207, 215 (1945).

It is conceivable that, when hospitals are operated for profit, there will be a greater tendency to overcrowd them than there would be when they are not so operated. The

more beds there are, the greater the revenues; fewer beds mean lesser profits, as petitioner himself asserts (112-113; Pet., p. 17).

In Hayt & Hayt, *Legal Guide for American Hospitals* (N.Y., 1940), the following statement is made (p. 70):

> "'There is greater tendency for states and local governments to regulate for-profit hospitals than there is to control charitable institutions. As with maternity hospitals, the regulations in the various states affecting private hospitals differ from one another. The influence of the standardization program of the American College of Surgeons has made state regulation of charitable hospitals less necessary than for private hospitals; voluntary institutions desire to be accredited; private hospitals, because they are smaller and for various other reasons, rarely can meet the minimum requirements of the American College of Surgeons.' [Citing Waas, M.D., Frederick J., Need of Cooperation between the Medical Staff and the Hospital Governing Body, *Hospitals*, p. 104, April 1940.]"

While non-profit making institutions may also overcrowd, the legislative body may have thought that the problem was more acute in the case of profit making ones. The dissent below notes that non-profit hospitals as well as profit making ones are subject to pressures to overcrowd which are not dependent upon profits (Pet., pp. 31-32). But, if the profit element can conceivably make the total pressure greater in the one situation than in the other, differential regulation is justified.

"Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas*, 310 U.S. 141. Or the reform may take one step at a time, addressing itself

to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Dental Examiners*, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L.* v. *American Sash Co.*, 335 U.S. 538." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955).

The discussion of motive in the dissenting opinion (Pet., p. 31) misses the point of the regulations, which is to prevent overcrowding in situations in which such a condition is more likely to exist than in other situations; not to determine whether there has been overcrowding at any given time and place; and not to punish, where it has existed, because profit has been the motive.

It is urged in the dissent below that, since the regulations allow a non-profit hospital to do what a profit making hospital cannot do, the regulation has no relation to the public health, since legality turns not on the practice but on the practitioner (Pet., p. 32). But, as we have noted, the legislative body may have concluded that non-profit hospitals as a class do not present the same problem of overcrowding. An argument similar to the one here made in the dissent below was rejected by this Court in *Railway Express* v. *New York*, 336 U.S. 106, 109-110 (1949):

If the legislature believes that an evil exists in certain cases, "it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157, 160 (1912). "It is not enough to invalidate the law that others may do the same thing and go unpunished if, as a matter of fact, it is found that the danger is characteristic of the class named". *Patsone* v. *Pennsylvania*, 232 U.S. 138, 144 (1913). "It is no requirement of equal protection

that all evils of the same genus be eradicated or none at all". *Railway Express* v. *New York*, 336 U.S. 106, 110 (1949).

This Court has recognized the validity of distinctions based upon intangibles of prejudice, of sensibilities regarding display of the flag, and of comparative exposure to moral temptation. See, respectively; *Bryant* v. *Zimmerman*, 278 U.S. 63 (1928); *Halter* v. *Nebraska*, 205 U.S. 34 (1907); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948). It is not patently less reasonable, in a society heavily weighted with materialistic, competitive values, to make a classification based upon whether a money-making operation is involved.

We do not suggest that differential regulation is always warranted when goods or services affecting health or safety are sold for profit. But this is not a situation involving aspirins or automobiles. Here there is no competition to educate consumer preference, no opportunity to exercise such preference as may exist, and no basis on which to make a competent lay evaluation of what is being received. Moreover, a dissatisfied hospital patient cannot, like the ordinary consumer, switch brands or dealers. He must usually wait until he is no longer a patient.

(b)

Petitioner points to certain exceptions in the Code, made in favor of old licensees, and implies that, somehow, somebody has been given a consideration that has been denied to him (Pet., pp. 18-19). But nothing has been conceded to old licensees which has been withheld from petitioner. Nor is there any exception regarding the minimum area requirement here involved.

(c)

The brief of *amicus* is devoted largely to establishing that the Board of Hospitals, which promulgated the Hospital Code, has power to regulate non-profit and municipal

hospitals. Based upon considerations which are purely local in character, we disagree with the analysis made by *amicus*. But in any event, the argument of *amicus* is intended to refute a contention that regulation of profit hospitals only is justified because there is no power to regulate other types (Brief of *amicus*, p. 6). We have made no such argument. Assuming, *arguendo*, that there is power to regulate as *amicus* urges, we stand on the position asserted in (a) of this point.

POINT II

There is no substantial due process question.

Petitioner does not urge that the area requirement is unrelated to the protection of patients' health and safety. He seems to urge that since his operation satisfied existing legal requirements, the latter could not be changed if the effect is to reduce his profits (Pet., pp. 14, 17, 20). That is not the law. *Queenside Hills Co.* v. *Saxl*, 328 U.S. 80 (1946).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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May 22, 1959

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1958

CHARLES L. ENGELSHER, M.D., as Director, Owner and Licensee of a private proprietary hospital known as "PARKCHESTER GENERAL HOSPITAL,"

Petitioner,

AGAINST

MORRIS A. JACOBS, M.D., as Commissioner of Hospitals of the City of New York and as Chairman of the Board of Hospitals of the City of New York,

Respondent

BRIEF OF ASSOCIATION OF PRIVATE HOSPITALS, INC. AS *AMICUS CURIAE*

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BRIEF OF ASSOCIATION OF PRIVATE HOSPITALS, INC. AS *AMICUS CURIAE*

Statement

This brief of the Association of Private Hospitals, Inc. as *Amicus Curiae* is being filed pursuant to Rule 42 of the Supreme Court Rules, with the consent of the parties.

This brief is being submitted in support of the Petition for a Writ of Certiorari filed with the Clerk of the Supreme Court on or about the 11th day of May, 1959 by the petitioner, Charles L. Engelsher and in support of his application for a stay made the same day.

The final order of affirmance of the Court of Appeals of the State of New York, sought to be reviewed was made and entered on the 13th day of March, 1959, and the last day that petitioner has to file his Petition for Certiorari and brief in support thereof, is ninety days from the entry of said order or June 11, 1959. (See Section 2101(c) of Title 28 of the United States Code.)

The Association of Private Hospitals, Inc., is a domestic membership corporation consisting of thirty-seven (37) member proprietary hospitals, most of whom are located in the metropolitan zone of New York City and are vitally affected by the provisions of the Hospital Code of the City of New York in effect since October 1, 1956, and specifically by the provisions of Section 56, Subdivision 4(b) thereof, which increases the floor area of each bed in other than single rooms to seventy (70) square feet per bed irrespective of the fact that all the member hospitals of the *amicus curiae* were built and operated prior to October 1, 1956, in accordance with the then prevailing regulations which required that "all beds used for patients shall be at least three feet apart where arranged in series and at least two feet from lateral adjoining walls" (Article V of the Regulations governing the establishment and maintenance of private proprietary hospitals in effect for approximately 25 years prior to and until October 1, 1956).

The real estate and equipment owned by the member hospitals of the *amicus curiae* have a money value in excess of seventy-five million ($75,000,000.00) dollars. These hospitals presently provide hospital care for approximately 20% of the paying patients hospitalized in the City of New York with a bed capacity of 4,548 as last reported in the Report of the General Inspector of the Department of Hospitals of the City of New York, as of January 15,

1958. The member hospitals cater only to private patients and absorb about 25% of the Blue Cross load. There are no ward patients in these hospitals and the bulk of the rooms are of semi-private nature consisting mostly of 2 beds in a room with an average floor area per bed of 60 square feet.

The Hospital Code in effect since October 1, 1956, would, if enforced, compel the member hospitals of the *amicus curiae* to reduce their bed capacity by a substantial percentage, estimated to be 20% at least, thus depriving the owners of these hospitals of their property without due process of law in violation of their federal constitutional rights, and also depriving the public of the use of approximately 910 beds per day and thus loading the already sorely overcrowded city and voluntary hospital fields not covered by any limitations as to bed or nursing service with the necessity to take care of these additional patients, who would not be able to be taken care of by private proprietary hospitals presently in operation in the City of New York, if the provisions of Section 56 (4) (b) were declared by this Court to be constitutional and thus enforcible by the respondent herein. Actually since the bulk of the rooms in the member hospitals are semi-private and contain 2 beds per room, the member hospitals, if compelled to comply with the provisions of Section 56, subdivision 4(b), would have to remove one bed from each semi-private room, thus being forced to provide 120 square feet per bed rather than the 70 square feet required unless of course they undertake major construction changes such as breaking down walls, etc., a task of a nature not possible in a hospital institution unless all patients are removed and the hospital is closed for the period of the major alteration. Aside from the financial hardship that such an alteration would impose on the operators, the harm to the public by being deprived of

the use of these hospitals during the period of the required alterations would be very great.

Argument

The *amicus curiae* shall not in this brief repeat the argument made by the petitioner nor cite cases already referred to in the petition for a writ of certiorari. The *amicus curiae* agrees with the major premise raised, namely, that the bed area requirements as provided by the Code and *required of private proprietary hospitals* only are discriminatory and violate the due process clause of the Federal Constitution.

The *amicus curiae* contends that the only issue before this Court is, whether or not the new standards as to bed area of the Code reasonably relate to the protection of patients' health and safety when such requirements are limited only to private patients *with a choice of selection of hospital accommodations* and are not applicable to city and voluntary hospitals where no such choice exists.

Respondent cited in the Court of Appeals of the State of New York *Matter of Spielvogel* v. *Ford*, 1 N. Y. 2d 558, 562 (1956), in support of its contention that the challenged sections of the Code are constitptional. However the very language of that cited case supports the petitioner's position rather than respondent's position. That Court there stated *inter alia*:

> 'Courts strike down statutes only as a last resort (citing cases), and only when unconstitutionality is shown beyond a reasonable doubt (citing cases). *But, for all that, due process demands that a law be not unreasonable or arbitrary and that it be reasonably related and applied to some actual and manifest evil* (citing cases). And even though a

police power enactment may have been or may have seemed to be valid when made, *later events or later-discovered facts may show it to be arbitrary and confiscatory* (citing Abie State Bank v. Bryan, 282 U. S. 765; 772).' (Italics ours.)

Certainly in the instant case, the very requirement that *only* private proprietary hospitals increase their standards by providing additional floor area per bed in other than single rooms, when no such requirement is made or demanded of city and voluntary hospitals, makes these provisions unreasonable and arbitrary.

There is no logical basis for the respondent's argument urged in the Court of Appeals that the provisions of Section 56, Subdivision 4(b) restricting the floor area of beds in rooms other than single when limited to private proprietary hospitals only are reasonably related to the protection of public health, nor can the *amicus curiae* agree with the argument of the respondent urged below that "It is conceivable that when profit is the primary motive of a hospital's operators, they would be more prone to overcrowd it, and to understaff it, than would be a hospital administration not so motivated". The *amicus curiae* does not find fault with the right, power and duty of the Board of Hospitals to establish and promote the highest possible standards for the care of the sick, injured, aged and infirm persons, but it urges that any rules establishing such standards must be consistent with the Constitution, the Statutes of the State of New York and with the New York City Charter. To single out private proprietary hospitals and impose restrictive standards on them alone in the alleged interest of public health when no such standards are established for other hospital institutions over which The Board of Hospitals has jurisdiction is clearly discriminatory and is inconsistent with the Constitution.

The yardstick used by the respondent such as "profit motive" is irrelevant and highly speculative and not based on any objective finding of facts. If the protection of the public health requires that the floor area per bed in other than single rooms should be seventy (70) square feet, then such a requirement in order to protect the public must apply to *all* hospitals under the jurisdiction of the respondent and not only to a small segment of such hospitals. Otherwise we have class legislation rather than legislation to protect the general public.

It has been argued by the respondent below that the jurisdiction of the Board of Hospitals is limited to private proprietary hospitals and that therefore it, The Board of Hospitals, is limited to regulating private proprietary hospitals only and cannot impose the same standards on city or voluntary hospitals. It is respectfully submitted that that is not so. The Court's attention is respectfully directed to the following applicable statutes:

Article 1 of the Hospital Code in effect October 1, 1956, Section 2 thereof, under the headline "Purpose", reads as follows:

> "The purpose of this code is to state the rules and regulations adopted by the Board of Hospitals of the City of New York in order to exercise the jurisdiction conferred upon it by the New York City Charter."

The *New York City Charter, Section 583a,* subdivision "a" provides that The Board of Hospitals was created by virtue of The New York City Charter, Chapter 23, Sec. 582-2, Subd. "a" (fol. 372 of Papers on appeal).

> "*Section 583-a.* Jurisdiction of department.
>
> (a) The department shall:

1. Maintain and operate all hospitals, sanatoria, almshouses or other institutions of the City for the care of sick, injured, aged or infirm persons, except as otherwise provided by law, and shall have charge and control of the ambulance service provided by the city, and, except as otherwise provided by law, over any psychopathic service for the examination, observation and treatment of persons and over any other service maintained by the city for the care of sick, injured, aged or infirm persons as may be assigned to the department or the commissioner by law." • • •

"*Section 583-b.* Powers and duties of the board of hospitals.—The board of hospitals shall have the power and duty to:

a. Develop and maintain long range programs of hospital service for the care of sick, injured, aged and infirm persons who are the responsibility of the department.

b. Establish and promote the highest possible standards for the care of sick, injured, aged and infirm persons to be complied with by institutions under the jurisdiction of or subject to licensing by the department *and by institutions which care for any such persons at the expense of the City;* (italics ours)

c. Develop, establish and promote standards and methods for increasing the efficiency of operation, maintenance and management of facilities for the care of sick, injured, aged and infirm persons *in institutions under the jurisdiction of the department;* • • • " (fols. 332, 369-371 of Papers on appeal). (Italics ours.)

"*Section 583-d.* Hospital Code.—

a. The board of hospitals is hereby authorized and empowered to promulgate a hospital code and from time to time to add to and to alter, amend or repeal any part of such code. Such hospital code shall consist of such rules and regulations, *not inconsistent with the constitution or the laws of this state or with this charter,* as may be necessary to carry out the powers and duties vested by law in the department of hospitals and the board of hospitals * * *" (fols. 333, 372-373 of Papers on appeal). (Italics ours.)

A mere reading of the above quoted sections of The New York City Charter and of Article 1, Section "2" of The Hospital Code, clearly shows that the jurisdiction of the Board of Hospitals, the promulgator of The Hospital Code in question, extends to the establishment and promotion of "the highest possible standards for the care of sick, injured, aged and infirm persons to be complied with by institutions under the jurisdiction of or subject to licensing by the department (private proprietary hospitals and nursing homes) *and by institutions which care for any such persons at the expense of the City.*" (Italics ours.) It should be noted that only city hospitals and/or voluntary hospitals qualify for the designation of "institutions which care for any such persons at the expense of the City".

In order that there may be no doubt in the minds of the members of this Court that the Department of Hospitals of the City of New York operates and has under its jurisdiction fifteen (15) general city hospitals and thirteen (13) special hospitals, with an overall bed capacity of 19,899 beds, and that the Board of Hospitals, the promulgator of the challenged Hospital Code, is an adjunct of

the Department of Hospitals, to wit, its policy-making body, there are annexed to this brief, marked Exhibit "A" and made a part thereof, excerpts from the Annual Report of the Department of Hospitals of the City of New York for the year 1957 which conclusively show that all of the City hospitals with a bed capacity of 19,899 beds, not affected by the limitations imposed by Sections 48 and 56, Subd. 4(b) of The Code are under the jurisdiction of the respondent and the Board of Hospitals of the City of New York.

It is therefore self-evident that at least the City hospitals with a bed capacity of 19,899 beds, which are certainly under the jurisdiction of The Board of Hospitals, are concededly not covered by the provisions as to floor area as required of the private proprietary hospitals in the City with a bed capacity of only 4,548 beds and that therefore the argument that these provisions are necessary to protect the public health is clearly not applicable and in the language of the Court of Appeals in *Matter of Spielvogel, supra*, are unreasonable and arbitrary and are not reasonably related to some actual and manifest evil.

The Hospital Code and specifically Section 56(4)b thereof is repugnant to the Fourteenth Amendment and to Section 10 of Article 1 of the Federal Constitution.

CONCLUSION

The provisions of the Hospital Code of the City of New York, specifically Section 56, subd. 4(b) thereof should be declared unconstitutional and unenforcible by this Court and petitioner's application for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND RUBIN,
Attorney for Amicus Curiae.

Exhibit "A"

CITY OF NEW YORK

DEPARTMENT OF HOSPITALS

ANNUAL REPORT
For the Year
1957

MORRIS A. JACOBS, M. D.
Commissioner

HOSPITAL SERVICE AS DEFINED BY THE CHARTER OF THE CITY OF NEW YORK

Care and Treatment of Patients (Section 587)

"The hospitals or other institutions under the jurisdiction of the Department* shall be primarily for the care and treatment of the indigent sick of the City and for the protection of the public health, but the Department may receive for care and treatment in any hospital or other institution other sick or injured persons and temporarily may receive therein persons alleged to be insane under regulations made by the Commissioner.

A patient in a hospital or other institution under the jurisdiction of the Department who is able to pay, in whole or in part, for care and maintenance, or, if such patient be dependent, a relative legally liable for his support and maintenance, shall be liable for and shall pay to the extent of his ability for such care and mainte-

*The Department of Hospitals.

nance in such hospital or other institution, and the Commissioner shall collect and transmit such payments to the treasurer."

BOARD OF HOSPITALS

As provided in the City Council's Local Law No. 98 (approved July 27, 1950), the Board of Hospitals is comprised of five physicians with "broad medical, public health and hospital background and experience" and five laymen "distinguished in community and business affairs," with the Commissioner of Hospitals as chairman. The Board of Hospitals is the policy-making body of the Department of Hospitals and is empowered to develop and maintain long-range programs for the care of the sick, injured, aged and infirm persons who are the responsibility of the Department. Meetings are held the third Wednesday of each month, excepting August. Committees set up within the Board, in accordance with the local statute are: Committee of Long-Range Planning, Committee on Hospital Code, Committee on Professional Standards, and Committee of Annual Operating Budget.

The original ten members of the Board were appointed for one, two, three, four or five year terms, so that each year the term of one physician and one layman would expire. The members of the Board of Hospitals are:

Dr. George Baehr
Dr. Charles A. Gordon
Dr. Willard C. Rappleye
Dr. Howard A. Rusk*
Mr. Louis Goldstein
Mr. David M. Heyman
Mrs. Albert D. Lasker
Mr. John J. Lynch
Mrs. Anna Rosenberg

Dr. Morris A. Jacobs, Chairman
Mrs. Estelle Rodman, Secretary

*one physician vacancy.

FUNCTIONS AND ORGANIZATION

The Department operated 15 general hospitals and 13 special hospitals during the year with an average bed complement of 19,899. Patients treated totaled 263,702 for 6,916,910 days' care—6,124,965 on the wards and 791,945 on home care. The average bed occupancy rate was 84.8 in all hospitals—81.4 in the general and 88.3 in the special hospitals. There were 33,636 births for 152,290 days' care. Clinic visits totaled 2,502,559. Emergency ambulances served 339,921 persons.

Full-time, per annum employees totaled 33,457, (excluding house staff and student nurses), and physicians and surgeons working on hospital staffs without pay about 9,000. The Department's total expense budget as approved by the Board of Estimate for the fiscal year 1957-1958 amounted to $147,405,321, including mental health activities.

The organizational structure stemming from the Commissioner included two Deputies, one in charge of medical and hospital services and the other of legal, labor and personnel activities and institutional inspection. The four major bureaus are Medical and Hospital Services, Administration, Supply, and Engineering & Maintenance. The Department's executive officers are:

Morris A. Jacobs, M. D., Commissioner of Hospitals
Henry I. Fineberg, M. D., Deputy Commissioner
Maurice H. Matzkin, Deputy Commissioner
Henry W. Kolbe, M. D., Director, Bureau of Medical and Hospital Services
Herman E. Bauer, M. D., General Medical Superintendent
J. Clarence Chambers, Jr., M. D., General Medical Superintendent

Benjamin G. Dinin, M. D., General Medical Superintendent
Robert J. Carlin, Director, Bureau of Administration
Simon Hillman, Director, Bureau of Supply
Jacob Lustig, Director, Bureau of Engineering & Maintenance
Estelle Rodman, Secretary to Department
William A. Ettel, Assistant to Commissioner

This report was prepared under the direction of William A. Ettel, Assistant to the Commissioner; Dr. Marta Fraenkel, Director of Medical Statistics and Records; Sue Halpern, Administrative Assistant in Public Relations.

GENERAL AND SPECIAL HOSPITALS

Hospital		*Location*	*Medical Superintendent***
Bellevue Hospital Center		Manhattan	Randolph A. Wyman
Bellevue General	(1)		
Bellevue Psychiatric	(2)		
Bellevue Tuberculosis	(3)		
Bird S. Coler Memorial Hosp. & Home	(4)	Welfare Island	Carolyn Silbermann
Bronx Municipal Hospital Center		Bronx	Emanuel Lifschutz
Abraham Jacobi General	(1)		
Abraham Jacobi Psychiatric	(2)		
Nathan B. Van Etten Hospital	(3)		
Coney Island Hospital	(1)	Brooklyn	Eva Vandow
Cumberland Hospital	(1)	Brooklyn	Louis Binder
Elmhurst General Hospital*	(1)	Queens	Isadore Firschein
Farm Colony	(5)	Staten Island	Samuel Steinholtz
Fordham Hospital	(1)	Bronx	F. Isabelle Kapp
Francis Delafield Hospital	(6)	Manhattan	Allen Kane
Goldwater Memorial Hospital	(4)	Welfare Island	C. George Scherf
Gouverneur Hospital	(1)	Manhattan	Bernard Rand
Greenpoint Hospital	(1)	Brooklyn	Saul Penner
Harlem Hospital	(1)	Manhattan	Bernard B. Nadell
James Ewing Hospital	(6)	Manhattan	Marianne Hahn
Kings County Hospital Center		Brooklyn	Harvey Gollance
Kings County General	(1)		
Kings County Psychiatric	(2)		
Kings County Tuberculosis	(3)		
Lincoln Hospital	(1)	Bronx	Sander V. Smith
Metropolitan Hospital Center	(1)	Manhattan	Ferdinand Piazza
Morrisania Hospital	(1)	Bronx	Nathan Smith
Queens Hospital Center		Queens	Philip Kahan
Queens General Hospital	(1)		
Triboro Hospital	(3)		
Riverside Hospital	(7)	North Brother Is.	Rafael Gamse
Sea View Hospital	(3)	Staten Island	Irving F. Klein
Sydenham Hospital	(1)	Manhattan	Pauline Matusow

(1) general hospital
(2) psychiatric hospital
(3) tuberculosis hospital
(4) chronic disease hospital
(5) custodial home
(6) cancer hospital
(7) teenage drug addiction hospital

* Opened March 18, 1957 as a replacement for City Hospital, Welfare Island.

** all superintendents are M.D.'s